PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed December 10, 2004

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **Rolando M. Luis**, A Member of the State Bar.	)	**03-PM-03298** **OPINION ON REVIEW**

In recommending revocation of attorney disciplinary probation and imposition of a three-year actual suspension, we must decide whether the State Bar Court may also recommend that a previously disciplined attorney, respondent Rolando M. Luis, be required to make a showing of rehabilitation, fitness and learning, under Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct,[1] standard 1.4(c)(ii) (standard 1.4(c)(ii)), although respondent's underlying stayed suspension did not contain a requirement for that showing.

For the reasons we discuss *post*, we hold that a member of the State Bar who is recommended for an actual suspension of two years or more as a sanction for revocation of probation, may also be required to comply with the requirements of standard 1.4(c)(ii) even if that requirement was not included in the initial stayed suspension. Moreover, we determine that

[1]Unless noted otherwise, all further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

if the member fails to apply to return to good standing or fails to make the required showing under standard 1.4(c)(ii) prior to the expiration of the total period of stayed suspension, the member's actual suspension may be recommended to continue until the required showing is established.

In this case, we note, as also discussed *post*, that although respondent's initial stayed suspension omitted a standard 1.4(c)(ii) requirement, it was contained in his conditions of probation.

I. STATEMENT OF THE CASE

A. Background

Respondent was admitted to practice law in California on May 31, 1989. On September 1, 2001, the State Bar placed respondent on administrative inactive membership status for noncompliance with the State Bar's Minimum Continuing Legal Education (MCLE) requirements as required by section 6070, subdivision (a) of the Business and Professions Code, rule 958(d) of the California Rules of Court, and sections 13.1 and 13.2 of the State Bar MCLE Rules and Regulations.[2] Respondent was actually suspended on September 16, 2003, for failure to pay bar membership fees pursuant to section 6143, and remains suspended for that reason.

B. 2002 Original Disciplinary Proceeding, State Bar Court Case No. 01-O-00318 (*Luis I*)

Pursuant to stipulation, respondent admitted that in 2000 and 2001 he conspired to commit insurance fraud, shared legal fees with a non-lawyer, and made misrepresentations to the

[2]Unless noted otherwise, all further references to sections are to the provisions of the Business and Professions Code.

State Bar regarding his association with a non-lawyer contractor and his representation of clients (*Luis I*). Aggravating circumstances included that respondent's misconduct was surrounded and followed by bad faith, dishonesty, concealment and overreaching. In mitigation, after the initial exchanges of correspondence, respondent displayed spontaneous candor and cooperation with the State Bar during disciplinary proceedings.

Effective April 3, 2002, respondent was suspended from the practice of law by the Supreme Court for three years, execution was stayed, and he was placed on five years' probation with conditions including 1) a two-year actual suspension and until a required showing was made under standard 1.4(c)(ii), 2) submission of quarterly reports stating compliance with the State Bar Act and Rules of Professional Conduct, and 3) successful completion of Ethics School within one year of the effective date of discipline.

Although the two-year *actual* suspension condition required a showing satisfactory to the State Bar Court of respondent's rehabilitation, fitness to practice law, and learning and ability in the general law pursuant to standard 1.4(c)(ii) before the respondent would be permitted to resume the practice of law, the three-year *stayed* suspension did not require such a showing.[3]

As of the date of this opinion, approximately two and one-half years have passed since the effective date of the two-year actual suspension, and respondent has not petitioned our court

[3]The form of stipulated disposition used by the parties provided the opportunity to choose a standard 1.4(c)(ii) requirement to attach to the three year stayed suspension, but neither party chose it, and it was approved in that manner by the hearing judge.

to have his actual suspension terminated, although he has been eligible for almost a year to file such a petition. (Rule 632, Rules Proc. of State Bar.)[4]

C. 2003 Probation Revocation Proceeding, State Bar Court Case No. 03-PM-03298 (*Luis II*)

On September 8, 2003, the State Bar filed a motion with our court's hearing department to revoke respondent's probation (*Luis II*). Respondent did not participate in these proceedings and, on January 13, 2004, the State Bar Court found by a preponderance of the evidence (rule 561) that respondent failed to comply with the terms of his probation by failing to submit quarterly reports for the April 2003 and July 2003 quarters and by failing to submit proof of successful Ethics School completion by April 3, 2003.

The State Bar Court recommended that the respondent's probation be revoked, that the stay of execution of the three-year suspension be lifted and that respondent actually be suspended from the practice of law for thirty months, and until he has shown proof satisfactory to the State Bar Court pursuant to standard 1.4(c)(ii). However, the State Bar Court then limited the actual suspension by stating that it "shall not exceed three years, which is the total length of stayed suspension originally imposed."

On January 30, 2004, the State Bar sought clarification or reconsideration of the State Bar Court's decision. Specifically, the State Bar requested clarification as to why the State Bar Court imposed a thirty-month actual suspension with a 1.4(c)(ii) showing which was not to exceed three years actual suspension. The State Bar further inquired whether the Court found the

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[4]Unless noted otherwise, all further references to rules are to the Rules of Procedure of the State Bar of California.

discipline of thirty months' of actual suspension more appropriate or if the Court believed that it lacked the authority to impose an actual suspension of three years and a standard 1.4(c)(ii) requirement since it might exceed the total length of stayed suspension originally imposed.

On March 15, 2004, the hearing judge issued an order clarifying his decision, stating that pursuant to rule 562, any actual suspension recommended could not exceed the three-year period of stayed suspension in the underlying disciplinary matter. While the hearing judge agreed that respondent should be required to comply with standard 1.4(c)(ii) before he is permitted to practice law again, the judge stated that attaching that requirement to the actual suspension would be meaningless because it must terminate at the end of the three-year period. On April 8, 2004, the State Bar filed a request for summary review pursuant to rule 308, not requesting oral argument, and we submitted the matter without argument.

II. DISCUSSION

In a probation revocation proceeding, as a general rule, the hearing judge is limited by rule 562 and may not recommend an actual suspension as a sanction for probation revocation that exceeds the originally stayed suspension. The issue here is whether the hearing judge had the authority to impose an actual sentence that includes a standard 1.4(c)(ii) showing which may extend the length of stayed suspension beyond that originally imposed.

The original discipline recommended in *Luis I* required respondent as *a condition of probation* to make a standard 1.4(c)(ii) showing before he could resume the practice of law. Thus, the respondent's suspension could continue indefinitely, even after the period of actual suspension had expired. At first glance, this indefinite suspension appears to moot the issue on review. However, by recommending a full revocation of probation, the effect of the hearing

judge's decision effectively eliminates all of the conditions of probation, including the showing under standard 1.4(c)(ii) that imposed the potentially indefinite suspension in the original proceeding.

Although State Bar Court proceedings are unique and not strictly civil, criminal or administrative in nature (e.g., *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-302), we have looked at criminal procedure in evaluating some probation revocation issues. (See, e.g., *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Under California criminal procedure, when a court revokes a defendant's felony probation, it has the "option of either placing defendant on probation once again, on the same or modified conditions, or terminating probation and sentencing defendant to state prison. [Citations.]" (*People v. Hawthorne* (1991) 226 Cal.App.3d 789, 792). Although the criminal courts have discretion in imposing probation with modified conditions or terminating probation, once probation is terminated, if the judgment has been pronounced and its execution stayed, the court does not have discretion and must order that the judgment be imposed in full force and effect. (*People v. Howard* (1997) 16 Cal.4th. 1081, 1088, citing Pen. Code, § 1203.2, subd. (c)[5]; Cal. Rules of Court, rule 435(b)(2) (now rule 4.435(b)(2)).) Nevertheless, once probation is revoked, the conditions of that probation are also revoked. (See, e.g., *People v. Young* (1995) 38 Cal.App.4th 560, 562.)

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[5]Penal Code section 1203.2, subdivision (c) provides in relevant part, "Upon any revocation and termination of probation the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced. However, if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke the suspension and order that the judgment shall be in full force and effect."

A. The State Bar's Contentions

The State Bar presents four arguments in this case. First, it argues that the hearing department is not limited by rule 562 in recommending the full amount of stayed suspension originally imposed *and* a showing under standard 1.4(c)(ii). Second, the State Bar argues that rule 562 does not preclude the hearing department from imposing a standard 1.4(c)(ii) showing, even when the discipline in *Luis I* did not expressly include such a showing as a condition of the *stayed* suspension. Third, the State Bar argues that the purpose of imposing a standard 1.4(c)(ii) showing is not to extend the respondent's actual suspension period, but rather to protect the public. Fourth, the State Bar contends that the hearing department's decision in *Luis II* which terminates the respondent's actual suspension at the end of three years, effectively eliminates a showing under standard 1.4(c)(ii), thus depriving the public of needed protection.

B. *Howard* and *Hunter*

We have decided two cases that shed limited light on this matter: *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445 (*Howard*) and *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81 (*Hunter*).[6] Although we have never expressly articulated whether rule 562 allows a standard 1.4(c)(ii) showing that may extend the actual suspension beyond the stayed suspension originally imposed, we have implicitly authorized it in *Howard*. Also, in *Hunter* we required a restitution requirement before the

[6]We have also discussed briefly in *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 286 (*Dahlz*) the addition in an *original disciplinary proceeding* of a standard 1.4(c)(ii) requirement as part of a stayed suspension. However, in *Dahlz*, our brief reference to standard 1.4(c)(ii) was merely designed to show that its provisions there would become effective only upon the setting aside of the stayed suspension. (*Ibid.*) Moreover, *Dahlz* identified that if probation were subsequently revoked, no issue would be raised, as is now before us, as to the court's ability to require compliance with standard 1.4(c)(ii). (*Ibid.*)

respondent in that case was permitted to resume the practice of law, and, if respondent was to be actually suspended for more than two years, we recommended a showing under standard 1.4(c)(ii), even though such conditions were not part of the original discipline.

In *Howard*, the Supreme Court suspended the attorney from the practice of law for three years, stayed the execution of the suspension and placed him on probation for three years, subject to certain conditions including a thirty-day actual suspension. The original disciplinary suspension did not include a standard 1.4(c)(ii) requirement. When Howard failed to meet the conditions of probation and defaulted in the proceedings, his probation was revoked and the hearing judge recommended an actual suspension of 90 days. The State Bar requested review regarding the degree of discipline, arguing that the recommended discipline be increased to two years and include a required showing under standard 1.4(c)(ii). On review, we recommended that the degree of discipline be increased to a one-year actual suspension and until Howard had satisfied the requirements under standard 1.4(c)(ii). In doing so, we noted that Howard had already been inactively enrolled continuously for over one year and, cumulatively, the inactive enrollment and the one-year actual suspension had rendered Howard ineligible to practice law for over two years.

In *Hunter*, the Supreme Court suspended the attorney from the practice of law for one year, stayed the execution of that suspension and placed him on probation for three years with a thirty-day actual suspension and imposed other conditions, including restitution. When Hunter later violated probation, the hearing judge recommended that his probation be revoked and he be actually suspended for one year and until he made the restitution ordered in his underlying suspension. We adopted the hearing judge's recommendation by recommending that Hunter be

actually suspended for one year and until he provided proof of restitution as ordered in his underlying suspension. We therefore recommended restitution in a probation revocation proceeding where such a condition could extend the attorney's period of actual suspension. In addition, we recommended that if Hunter's actual suspension were to last longer than two years, a showing under standard 1.4(c)(ii) would be required. A requirement under standard 1.4(c)(ii) was added since Hunter's suspension would last longer than originally imposed. Lastly, in a footnote in *Hunter* we stated that the condition of restitution does not extend the period of suspension where a respondent may satisfy these conditions during the period of actual suspension. (*Hunter*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 87, fn. 4.)

In both *Howard* and *Hunter*, we recommended a standard 1.4(c)(ii) requirement after the revocation of probation where such a requirement was not a part of the originally imposed sentence and where it would not necessarily extend the suspension beyond that imposed in the original proceeding, providing that the attorney complied with the respective duties within the original period of the actual suspension. In each case, the Supreme Court adopted our recommendation.

C. Policy Underlying Standard 1.4(c)(ii)

A showing under standard 1.4(c)(ii) is normally required when an attorney is actually suspended for two or more years. Proof satisfactory to the State Bar Court of the member's rehabilitation, present fitness to practice and present learning and ability in the general law are required by a preponderance of the evidence before the member is to be relieved of actual suspension. (Rule 634.)

The purpose of staying the execution of a suspension and ordering probation with an actual suspension and a required showing under standard 1.4(c)(ii) is for public protection and attorney rehabilitation. (See *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298-299; see also std. 1.3; std. 1.4(c)(ii).) Although all forms of attorney discipline have the key purpose of protecting the public, the legal community and the maintenance of high professional standards (std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 318; *In re Nevill* (1985) 39 Cal.3d 729, 734; *In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 580 (*Murphy*)), a standard 1.4(c)(ii) requirement offers public protection in a specially needed area: a formal, although expedited and simpler proceeding than a formal reinstatement proceeding, which normally ensures moral fitness and legal learning before an attorney, suspended for over two years, is permitted to return to the practice of law.[7]

Looking at criminal law analogously, in *People v. Young*, *supra*, 38 Cal.App.4th at page 565, the court suspended the defendant's sentence and placed him on probation with the condition that the defendant pay restitution to the crime victim. The defendant violated probation and argued that restitution could not be ordered when probation is revoked if the originally suspended sentence did not include an order of victim restitution. (*Ibid.*) The court disagreed with the defendant, stating that it would be absurd to interpret the statute limiting probation revocation sentencing as requiring victim restitution when probation is granted and

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[7]In order to make a showing under standard 1.4(c)(ii) and be relieved from suspension, an attorney can petition as early as six months before the earliest date that the actual suspension may terminate. (Rule 632.) Also, since these proceedings are expedited (rule 630(b)), a petitioner could demonstrate rehabilitation, fitness to practice law and present learning and ability in the general law without necessarily extending his or her actual suspension period.

when probation is denied but not when probation is revoked. (*Id.* at p. 566.) The court further noted that the defendant's claim would allow the defendant to accept probation and violate it the next day and thereby avoid making restitution to the victim. (*Ibid.*) The court in *Young* stated that the intent of the statute would prevail over the literal construction and concluded that "victim restitution does not constitute an increase in punishment where it was a condition of probation and is continued as part of a sentence following revocation of probation." (*Ibid.*)

We discuss *Murphy*, *supra*, 3 Cal. State Bar Ct. Rptr. at page 579 and *In the Matter of Terrones* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 289, 299) (*Terrones*) to distinguish those cases from the present one. In *Murphy*, which was followed by *Terrones*, we rejected the distinction that a standard 1.4(c)(ii) proceeding is regulatory rather than disciplinary in nature. *Murphy* and *Terrones* were both cases in which a suspended attorney sought relief from suspension by petitioning the court for a hearing to establish the requisite showing under standard 1.4(c)(ii). In both cases, the hearing judge granted the petition and permitted the disciplined attorney to resume the practice of law. The State Bar sought review in *Murphy* and argued that a standard 1.4(c)(ii) proceeding was regulatory for the purposes of protecting the public and not disciplinary in nature. We rejected the distinction that a standard 1.4(c)(ii) proceeding was purely regulatory, and held instead that it was disciplinary, and that decision was later followed in *Terrones*. Nothing in *Murphy* and *Terrones* militates against our holding here.

In many other states, attorneys who are suspended actually must petition for reinstatement or establish rehabilitation and fitness before being permitted to practice law after the basic period

of suspension.[8] This requirement translates into an indefinite suspension for attorneys who choose not to petition or fail to make the necessary showing. California, by contrast, is more lenient than many other states in not ordinarily requiring a showing of rehabilitation unless the actual suspension is two or more years. Also, the American Bar Association Model Rules for Lawyer Disciplinary Enforcement recommend that attorneys suspended for more than six months should be required to petition for reinstatement to protect the public and that reinstatement is appropriate upon a showing of rehabilitation. (ABA Model Rules for Lawyer Disciplinary Enforcement, rule 25; see also ABA Stds. for Imposing Lawyer Sanctions, std. 2.3.)[9] In other

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[8]ABA/BNA Lawyers' Manual on Professional Conduct at page 101:3006. The rules of at least 18 other states require reinstatement for suspensions varying from over sixty days in some states to suspensions of over one year in others.

For a state requiring reinstatement after suspensions of sixty days, see Iowa Court Rules, rule 35.12 (2).

For states requiring reinstatement after suspensions of ninety days, see Rules Regulating the Florida Bar, rule 3-5.1(e); Minnesota Rules on Professional Responsibility, rule 18.

For states requiring reinstatement after suspensions of six months, see Arizona Rule of the Supreme Court 64(c); Delaware Lawyers' Rules of Disciplinary Procedure, rule 22(a); Illinois Supreme Court Rule 764; Indiana Rules for Admission to the Bar and the Discipline of Attorneys, rule 23, sections 3(a) and 4(a), (c) (requiring reinstatement for indefinite suspensions as well as definite suspensions exceeding six months); Kentucky Rules of the Supreme Court, rule 3.510 (1); Maryland Rules, rule 16-781(d)(1) (requiring reinstatement for indefinite suspensions and suspensions for more than six months); Rules of Discipline for the Mississippi State Bar, rule 12; Ohio Supreme Court Rules for the Government of the Bar of Ohio, Rule V, section 10(A), (C) (requiring reinstatement for indefinite suspensions as well as definite suspensions of six months or more); Oregon State Bar Rules of Procedure, rule 8.1(a).

For states requiring reinstatement after suspensions of one year, see Colorado Rules of Civil Procedure, rule 251.29(b); Pennsylvania Rules of Disciplinary Enforcement, rule 218(a); Tennessee Supreme Court Rule 9, section 4.2.

Finally, for a state that requires reinstatement for any suspension other than for nonpayment of membership fees, see West Virginia Rules of Lawyer Disciplinary Procedure, rule 3.30.

[9]ABA standard 2.3 states, in part, that "Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating

states, the purpose of requiring reinstatement after a lengthy suspension is also to protect the public. (See, e.g., *Driscoll v. People* (Colo. O.P.D.J. 2003) 77 P.3d 471, 477; *Matter of Reinstatement of Page* 2004 Ok 49, ¶ 3 [94 P.3d 80, 82]; *In re Starr* (2000) 330 Or. 385, 389 [9 P.3d 700, 704]; *Matter of Bucci* (R.I. 1994) 643 A.2d 192,193-194; *State ex rel. Florida Bar v. Hogsten* (Fla. 1961) 127 So.2d 668, 670; *Matter of Woolbert* (Ind. 1996) 672 N.E.2d 412, 417.)

D. Effect of Standard 1.4(c)(ii) Does Not Necessarily Extend Suspension Period

Imposing a condition under standard 1.4(c)(ii) does not necessarily extend the actual suspension. As we noted in *Hunter*, the respondent could satisfy the condition before the period of actual suspension terminates. (Std. 1.4(c)(ii); *Hunter, supra,* 3 Cal. State Bar Ct. Rptr. at p. 87, fn. 4.) Here, respondent had notice of his probation and the conditions, including the standard 1.4(c)(ii) condition, and not only did he violate probation, but he did not participate in these proceedings.[10]

In probation revocation proceedings, rule 562 limits the recommended actual suspension to the total amount of stayed execution originally imposed. However, a standard 1.4(c)(ii) condition does not necessarily extend the actual suspension of a respondent where a showing can be made within the period of actual suspension. Therefore, although a standard 1.4(c)(ii) requirement was not attached to the three-year stayed suspension, following the implicit authority to do so in *Hunter*, and persuaded by the analogy in *People v. Young*, *supra*, 38 Cal.App.4th 560

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rehabilitation, compliance with all applicable discipline or disability orders and rule, and fitness to practice law." ABA standard 2.3 advocates reinstatement for all suspensions since it also recommends that suspensions be of six months or greater.

[10]We offer no opinion in this case as to whether or not respondent has made the requisite showing under standard 1.4(c)(ii) should he petition to terminate his actual suspension.

we are not prohibited from recommending such a condition in a probation revocation proceeding. To do otherwise would permit respondent to violate probation and resume the practice of law after being suspended for over five years, without ever making a showing of his rehabilitation, fitness to practice law or his learning and ability in the general law, thus defeating the important level of public protection regularly recommended in lengthy suspensions, which was imposed as a condition of probation.

III. CONCLUSION

For the foregoing reasons, we find that rule 562 does not limit the State Bar Court's authority to impose a standard 1.4(c)(ii) requirement in a probation revocation recommendation, even where the originally stayed suspension did not include such a requirement or where the recommendation for actual suspension as a form of discipline will exceed two years.

The hearing judge in *Luis II* recommended a thirty-month suspension with a showing under standard 1.4(c)(ii) for only six months as an incentive for respondent to end his suspension within three years by making a satisfactory showing of rehabilitation. The hearing judge agreed that the respondent should be required to demonstrate his rehabilitation before being permitted to return to the practice of law, to afford protection to the public. However, the hearing judge limited the total period of suspension to three years pursuant to rule 562. Although the hearing judge was correct in not recommending an actual suspension that necessarily exceeded the stayed suspension in the underlying disciplinary matter, he incorrectly concluded that a standard 1.4(c)(ii) showing was not available unless it were limited to a duration of six months.

IV. FORMAL RECOMMENDATIONS

For the reasons stated, we recommend to the Supreme Court that respondent Rolando M. Luis's probation in Supreme Court matter S102790 (State Bar Court case no. 01-O-00318) be revoked; that the stay of execution of the previous suspension be lifted; and that respondent be actually suspended from the practice of law for three years[11] and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice law, and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. We also recommend that the State Bar be awarded costs in this matter pursuant to section 6068.10 of the Business and Professions Code and that those costs be payable in accordance with section 6140.7 of the Business and Professions Code.

Since respondent is already under a duty to pass the Multistate Professional Responsibility Examination in *Luis I*, we do not again recommend that he be required to take and pass the examination. We are not recommending that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court, since respondent was already ordered to comply with these requirements incident to his actual suspension in *Luis I*.

STOVITZ, P. J.

We concur:

WATAI, J.
EPSTEIN, J.

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[11] The hearing judge in *Luis II* would have recommended a three-year actual suspension when revoking probation, but also wanted to recommend a standard 1.4(c)(ii) requirement and he believed he was limited to three years for all recommendations per rule 562. Thus, we regard our recommendation of three years' actual suspension and until a 1.4(c)(ii) requirement as essentially consistent with the hearing judge's overall aim in recommending discipline.

Case No. 03-PM-03298

In the Matter of Rolando M. Luis

Hearing Judge

Hon. Robert M. Talcott

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